

Service Date: February 27, 1995

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF GARY EUGENE)	TRANSPORTATION DIVISION
PLOUFFE DBA PLOUFFE DISPOSAL)	
SERVICE, St. Ignatius, Montana for a)	DOCKET NO. T-93.98.PCN
Montana Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6269b

FINAL ORDER

1. On July 26, 1993 Gary Eugene Plouffe dba Plouffe Disposal Service (Applicant), St. Ignatius, Montana filed an application with the Montana Public Service Commission (Commission) for a Class D Certificate of Public Convenience and Necessity to transport garbage and refuse within St. Ignatius, Montana and a 25 mile radius and to permit service to any tribal member within the exterior boundaries of the Flathead Reservation. If granted, this application would amend Applicant's existing authority under PSC No. 3329 which permits garbage service within St. Ignatius and a seven-mile radius.

2. This application resulted, in part, from a letter to Mr. Plouffe from J. David Burchett, Chief of the Enforcement and Tariff Bureau at the Commission. Responding to complaints, particularly from Flathead Disposal, Inc., that Mr. Plouffe was operating outside the scope of his authority, the Commission informed Mr. Plouffe that it would investigate and take any necessary enforcement actions. The letter directed Mr. Plouffe to limit operations to the seven-mile radius of St. Ignatius. The Confederated Salish and Kootenai Tribes of the Flathead Nation (Tribe) by letter dated August 18, 1993 maintained that the Commission has no jurisdiction over the Applicant as a tribal member. Pending outcome of the application, Mr. Burchett directed the Field Officer for Flathead County, Bob Charles, to stay enforcement of alleged violations of Applicant's operating authority.

3. Flathead Disposal, Inc., Ronan, Montana protested the application on August 26, 1993. Flathead Disposal has two Class D authorities for transportation of garbage (PSC Nos. 1448 and 2870), which would coincide with most of the authority requested.

4. The scheduled hearing on the application for December 1, 1993 in St. Ignatius was continued to allow parties to brief tribal/state jurisdictional issues.

5. Procedural Order No. 6269 issued November 24, 1993 set a hearing date of February 1, 1994, and allowed the Tribes an opportunity to participate as an intervenor or amicus upon filing a request. On December 23, 1993 the Commission granted the Tribes leave to file Amicus Briefs on jurisdictional issues in this proceeding.

6. The Commission received timely briefs from the Tribes and Protestant, but not from counsel for Applicant. At a duly noticed work session on January 28, 1994, the Commission lifted a stay on enforcement against Applicant on garbage hauling service to non-tribal members outside the scope of his existing authority. The Commission reserved a determination on the jurisdiction over service to tribal members, in effect allowing this service pending the final determination. In Order No. 6269a, the Commission rescheduled the hearing for April 6, 1994, and compelled counsel to file a brief on or before February 18, 1994.

7. Applicant notified the Commission that he was looking for a new attorney and was unable to file the brief. The Commission set March 14, 1994 as the date to file the brief. On March 14, 1994 Applicant notified the Commission that he had just obtained representation and requested postponing the hearing so that his attorney could research the case.

8. On March 18, 1994 the Commission continued the hearing. On June 23, 1994 the Commission conducted a public hearing in City Hall, St. Ignatius, Montana.

9. Parties agreed at the conclusion of the hearing to further briefing from the Amicus Party (the Tribes), but parties declined to further brief the issues. The Supplemental Amicus Brief was filed on July 12, 1994. In August Congress passed legislation deregulating much of transportation, effective January 1, 1995, apparently retaining intrastate jurisdiction over garbage hauling, passenger service, and household goods. The status of regulation, however, has been

uncertain, in the courts, in Congress and in the state legislature. It now appears certain that the Commission will continue to regulate garbage hauling.

SUMMARY OF TESTIMONY

Public Testimony

10. **Joseph Gerald Brooks** resides in Ronan and owns the Countryside Cafe in Charlo. He knows both Applicant and Protestant, and has known of activities in the area for a long time. Applicant provided good garbage service to Mr. Brooks until he ceased at the direction of the Commission. Protestant now provides his garbage service.

11. Mr. Brooks is a firm believer in competition as beneficial to all parties. The population is rapidly increasing in the area, which means a need for more service. Industry has to be subject to competition as an incentive to work a little harder, he maintained. He supported the application, but if someone else applied, he would support that application as well. He doubted that he would use the proposed service now if the application were granted. It is time for the state to step out of this business and let competition take care of itself, he testified.

12. **Phyllis Marlene Murphy** owns a restaurant in Ronan. She also knows and has dealt with both Protestant and Applicant. She had contracted with Applicant for garbage service which ceased in December, 1992 at Commission direction. Applicant's service was "fantastic"; garbage was always picked up, never on the ground. She had previously had service from Flathead Disposal and is not served now, because she was not pleased with this service. Often, they did not completely empty the garbage cans and left garbage on the ground. They told her that she needed more service at higher prices. She now hauls her own garbage. If the application is denied, she would still haul the garbage, but if granted, would use Applicant's service.

13. **Betty Lou Marceau Martin** owns a fabric store in Ronan and lives in St. Ignatius. Applicant has provided her residential garbage service since 1976. Protestant provided her garbage service in Ronan at her shop about three or four years ago until she started carting it home to her dumpster. Since then, she had observed and did not approve of the way Protestant provided service to her neighbor. The dumpster was emptied and anything left was not picked up. Applicant, on the

other hand, had told her to stand the extra trash by the dumpster; it was always picked up. Mrs. Marceau is a tribal member. She would use Applicant's service in Ronan, if available.

14. **Alfred Salway** is the director of business management at Kickinghorse Job Corps. Both Protestant and Applicant submitted bids for the federal contract. Applicant's bid was lowest; he has provided very good service.

15. **Ken Hurt** is a registered pharmacist and owns Mission Drug Store. For 12 years he has been mayor of St. Ignatius. He knows nothing about Protestant's level of service. He testified that Plouffe Disposal has provided exemplary service for 28 years to the business and 12 years to the town. For nine years, he provided his service free of charge to the town.

16. **Mark R. Rowe** resides in Ronan. He was very happy with the service Applicant provided until the end of 1992. He has had service from Protestant which he was also happy with, but had some concerns about billing matters which had been worked out. Mr. Rowe stated that he would continue to use Protestant's service, but supported the application because he believed in competition.

17. **Thomas Walchuk** operates an "RV" park on the northern edge of Ronan. He used Applicant's service until he quit picking up because of the radius. The service was excellent. Mr. Walchuk recalled some history (objected to as irrelevant) on Protestant's service six years before at another location, recalling that garbage was not picked up timely and he had to clean up afterward. The sooner Applicant obtains service, the better, he maintained.

18. **Harry Michael Miller**, an insurance agent, owns two businesses in Ronan. Both Protestant and Applicant have provided garbage service. Applicant ceased service when ordered to do so. Applicant's service was excellent; he would do extra pickups, apparently free of charge. Mr. Miller's service from Protestant began ten years ago and ended two years ago. When he was late with the bill or had a problem with service he could not contact them. They did not respond to letters or return phone calls. When Applicant began providing service, the price was a little less but not significantly so. Protestant did not pick up their dumpsters as requested and continued to bill. He believed his bill was paid in full when he terminated service. Because of frustration with Protestant,

he now hauls his own garbage or his father will do it. He supports the application. He admitted that his father uses Protestant's service where he takes his garbage.

Applicant's witnesses

19. **Gary Eugene Plouffe**, dba Plouffe Disposal Service, took over the family's garbage disposal business when his father had a stroke in 1974. He drives the garbage truck himself and employs one helper three times a week every other week and Saturday since October, 1993. He has a second job delivering fuel in the afternoon. He pays his workers compensation insurance payments. He has 300 customers within the seven-mile radius of his authority and some tribal members outside but within the exterior boundaries of the reservation. If the application is granted, he intends to serve the 25-mile radius -- as far as the roads can go east, south to the top of Evaro Hill, west of Perma. None of this proposed service would be outside the reservation.

20. Mr. Plouffe testified that he has competition in St. Ignatius, including Flathead Disposal, Mission Valley Disposal (MVD) and DMW Disposal. He discovered the existence of MVD in 1991 when he bid for a tribal contract. Under the tribal preference, he was "beat out" because Flathead Disposal's owners had entered into a partnership with a tribal member. He thinks that competition is good for everyone, although he finds it unfair that Flathead Disposal can compete with him in his service territory but he cannot compete with Flathead Disposal outside his seven-mile radius. Mr. Plouffe said that he was denied authority on a previous application because Protestant said that there was not enough need for another carrier. Since then, there has been a lot of growth in the area. He has updated his equipment. He receives a lot of calls from Arlee, Ronan and Pablo. Mr. Plouffe testified that he discontinued service to nonmembers outside his seven-mile radius in January, 1993 at the direction of the Commission. He has applied for authority because he perceives a need for additional authority, believes that competition would be beneficial, and wants to compete with Flathead Disposal head to head.

21. Under cross-examination, Mr. Plouffe admitted that most of his customers from the tribe are in the Flathead area near Highway 93 on the way to the county landfill. He had told tribal members located on the reservation the other direction toward Arlee that he was restricted to a seven-mile radius. Mr. Plouffe maintained that he told customers south of St. Ignatius that he was not

taking more customers because the state had not clarified whether he could haul for tribal members. He testified that he did not know why he had not served tribal members in Arlee or Pablo. On subsequent questioning he admitted that it would not be profitable to go back toward Arlee unless he adjusted rates. He would serve Arlee if required to go there, he testified. He also admitted that he had not contacted tribal members on the east shore of Flathead Lake about providing service (although the area is within the reservation).

22. Mr. Plouffe testified that although he discontinued service to all non-tribal members outside his seven-mile radius, he continued to serve tribal members. He went to the legal department of the Tribes and was told that the Commission could not tell him what to do. Mr. Plouffe believed that he had complied with the Commission orders within reason.

23. Mr. Plouffe further testified that he does all the maintenance work on his equipment. His present equipment could handle the proposed extended service area. He would hire new employees as needed. He pays federal taxes, but not state taxes or county license fees on the vehicle (he is exempt). He pays workers compensation insurance for his employees, but not himself. He advertises in Chartrusa News, but not in Ronan or Arlee. He is visible in Ronan, going through there five or six times a week, but he is not visible in Arlee.

Protestant's witnesses

24. **Bob Charles**, enforcement officer for the Commission, testified under subpoena from Protestant. Before December, 1992, he sent a report to his supervisor indicating that Applicant was operating outside the scope of his authority. It was his impression that Applicant believed he was exempt from regulation for serving tribal members. Mr. Charles never observed him serving non-tribal members. The Plouffe dumpsters were located at the residences and businesses of tribal members.

25. **Debbie Gervais** lives on Airport Road four miles from Ronan. She testified that when they purchased the farm she called Mark Johnson of Flathead Disposal (Protestant). He provided a box within a week. She has been pleased with the quality of service for the last two years. His rates are \$20 per month, reasonable for the distance traveled and the amount picked up.

She expressed concern that service continue outside town. Because of activity from bears, it is important to keep the area clean for safety.

26. **Marc Johnson**, operator of Flathead Disposal and manager of Mission Valley Disposal, protested and opposed the application. His certificates Nos. 1448 and 2870 allow him generally to serve in a 50-mile radius of Ronan. Mr. Johnson testified on the history of garbage hauling service in the Flathead Valley, stating that head-to-head competition had forced providers to sell out. When he first started garbage-hauling, competitors were operating on a shoestring, running here and there and all over the valley, unable to make a living and continue to provide good service. Mr. Johnson bought out several competitors and his partner in about 1979 and changed the name to Flathead Disposal. He has been able to build up the business and improve his equipment and service, going into debt to obtain up-to-date equipment. Now he has three rear-loaders, an auto-side loader, a roll-up system, numerous dumpsters, roll-off dumpsters (one for 40 cubic yards and one for 3 cubic yards), drop box, stationary compactors and sundry equipment. He can provide from one bag to 40 cubic yard service. He provides service six days a week, with on call service available for Sunday. He has not received any complaints, he testified. He has three full time drivers; his step-daughter works full time in the office; two kids and his wife work part-time; and he works full time in all facets of the business (averaging 60-70 hours per week).

27. Mr. Johnson testified that he could easily provide service to St. Ignatius. He can provide roll-off service, which Mr. Plouffe cannot provide. In fact, Flathead Disposal now provides roll-off service to a house northeast of town that Plouffe had served, because they needed the roll-off service. Mr. Johnson testified that there is a lot of "deadhead" on the rural routes, but he provides the service because it is part of his territory and he has an obligation to serve. He used to go to Rollins and Lake Mary Ronan until the County put dumpsters at a roll-off site and he lost all that business. In North Lake County, Balazic from Big Fork does a good job. There is not enough to pay for one truck there, let alone two trucks. Balazic cuts off to the south end of the lake and cannot haul in Polson. Mr. Johnson stated that 70 percent of the gross revenues in Ronan/Pablo make it possible to provide service in other areas. Losing an account in the populated areas is more painful than the outlying areas.

28. Mr. Johnson explained that Mrs. Martin's concerns on observing alleged failure to pick-up a neighbor's garbage involved the neighbor's truck blocking the dumpster. The neighbor apologized for blocking and moved the truck during pick-up days. On allegations that Flathead left garbage near the Lake County Leader, Mr. Johnson explained that there were 50-60 extra bags of shredded paper. A lot of items are stored covered near the porch area and they have to be careful. Twice, they accidentally picked up items not intended as trash. On Mr. Walchuk's claims of bad service six years before, Mr. Johnson said that Mr. Walchuk had never personally discussed the concerns with him. He recalled that there were three inconsistent sets of orders from Mr. Walchuk and two family members.

29. Mr. Johnson maintained that 50 percent of the population in Arlee are tribal members, and they never see Plouffe Disposal. There is an unlicensed, unregulated hauler in the Arlee area, too. Mr. Johnson has had competition in Ronan and Pablo, a little from Plouffe. DMW did not haul the previous spring, although it had previously. There was also an unlicensed hauler using a flatbed Ford, one-ton construction truck with wood side boards and net for a top hauling in the area. Mr. Johnson further stated that DMW, an enrolled member, was competing with Plouffe outside Flathead Disposal's area. McDonald served south on Highway 93 to the city limits of Polson, he stated. Mr. Johnson maintained that there was abundant competition, if somewhat harmful to existing business, including Plouffe.

30. On further examination, Mr. Johnson testified that he serves about 1,200 customers and that 70 percent of his gross profits come from Ronan and Pablo (not 70 percent of his customers). Only 42 customers discontinued service. The primary reasons in the business records included moving away (number 1 reason), non-payment (number 2 reason), increased landfill costs resulting in higher rates, and Lake County's new dumpster site.

31. Mr. Johnson testified that if the application is granted, he may lose a lot of business on the highway between St. Ignatius and Polson. This loss would "take out the heart and lung" of his business, he stated. He would have to pull back his service and do what he would have to do to keep business alive. There would be an eventual winner and a loser -- his experience indicates that

there would not be two haulers eventually if they share the same area. He did not think it was too much to ask to keep Pablo and Ronan.

32. Under cross-examination Mr. Johnson testified that his rates do fluctuate. He tries to keep them the same, but, for example, Evaro Hill and back to the landfill is a 50-mile run, which takes more gas and resources.

33. Further examination elicited the following testimony on Mission Valley Disposal (MVD). Walter Trump had been a part-time employee in MVD a couple of years before. The first time MVD operated with a permit there was confusion as to what sort of permit tribal business needed. MVD was established in 1990 to allow Flathead Disposal into partnership with a tribal member to bid tribal business. The contract for service for tribal accounts was signed by Robert McCrea, a major partner in MVD.

34. Mr. Johnson stated that he solicited customers directly in St. Ignatius about 12-14 years ago. He bid the Mission Valley Power Contract. He abandoned service to Rollins and the east side of the lake, pulling out of one area because he liked Mr. Balazic and wanted to give him a break, in part, he admitted. The actual reason, however, was that leap-frogging was not profitable. If Applicant is granted this authority, it will have dire consequences to his business and to rural service, he testified.

FINDINGS AND DISCUSSION

35. Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA), the Commission supervises and regulates intrastate motor carrier service for garbage hauling. § 69-12-201, MCA. The maintenance of an adequate common carrier motor transportation system has been declared a public purpose. § 69-12-202, MCA.

36. Section 69-12-323, MCA, sets out the requirements for a Commission decision on an application for a certificate and the evidence presented at hearing. The Commission shall determine from the evidence whether public convenience and necessity require authorizing the proposed service. The Commission will consider existing transportation service; the likelihood of the proposed service being permanent and continuous 12 months of the year; and the effect of the

proposed service on other essential transportation service in the affected communities. Under § 69-12-323(2)(b), MCA, for purposes of Class D certificates, a determination of public convenience and necessity may also include a consideration of competition.

37. The Commission has interpreted § 69-12-323, MCA, as requiring it to address these issues before granting an application for authority:

- a. Is the applicant fit and able to perform the proposed service?
- b. Does the public convenience and necessity require the authorization of the proposed service?
- c. Can and will existing carriers meet the public need for the proposed service?
- d. Would the proposed service have an adverse impact on existing transportation service?
- e. **(Discretionary for Class D applications, only)** If there is a public need for the service and applicant is fit to provide the service, but existing carriers could meet the need or might be harmed by granting the application, would competition with the existing carriers promote the public interest?

Fitness

38. The Commission makes a threshold determination of whether the applicant is fit, willing and able to provide the service, considering these factors: (1) the financial condition of the applicant; (2) the intention of the applicant to perform the service sought; (3) the experience of the applicant in conducting the service sought; (4) the adequacy of the equipment the applicant has to perform the service; and (5) the nature of previous operations, if there are allegations of illegal operations.

39. The Commission finds that Applicant is fit, willing and able to provide the service for which he has applied. Taking administrative notice of its records, the Commission finds that his father, Napoleon Plouffe, applied for authority to haul in St. Ignatius and a ten-mile radius in 1971, amending the application at hearing to a seven-mile radius. The protest was then withdrawn and Plouffe received Class D authority in July, 1971. His father transferred the certificate to Mr. Plouffe

in 1983. Mr. Plouffe has additional time and labor available to put his present equipment to use, and intends further to hire additional employees as needed. Applicant has maintained his equipment which, although not state of the art, is adequate to perform garbage hauling service. Witnesses generously praised the service Applicant provides. The Commission finds that Applicant intends to perform the proposed service 12 months a year. Applicant has many years of experience in performing garbage hauling service and is capable of providing the service in the extended area, in addition to the service presently provided under the existing certificate. Applicant has met the threshold requirement to demonstrate fitness.

Public Need and Convenience

40. In determining public convenience and necessity, the Commission has traditionally followed the analysis of Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936).

The question in substance is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. 1 M.C.C. 203.

41. The public need to meet in an application for a certificate of public convenience and necessity is shipper need. For a Class D application, the Applicant must demonstrate the need for garbage hauling service. Without a doubt the public requires garbage hauling. The testimony did not attest to a need that Flathead Disposal could not fulfill. Mr. Brooks, who now uses Protestant's service and would not switch to Applicant's service, if granted, testified only that he favored competition and would support the next applicant on the grounds of competition, as well. One witness testified that she would not use Protestant's service, but there was no indication of giving Protestant the opportunity to correct past deficiencies from three or four years before. She did not indicate that Protestant could not provide the service or that the rates were excessively high. The next witness, a tribal member, would not use Protestant's service in Ronan, instead hauling her business garbage home to St. Ignatius where Applicant serves her. Another witness testified to

complaints from six years before, but these complaints were remote and vague, and in conflict with Protestant's recollection. Other witnesses, non-tribal members within Applicant's existing service area, generally testified that Applicant's service is exemplary, which nobody denies. However, they do not require the service outside the seven-mile radius.

42. The Commission finds, based on the record, that the existing carrier, Flathead Disposal, is capable and willing to meet the shipper need supported by shipper testimony. Flathead Disposal presently has the equipment and employees to meet increased shipper need in the area of the application and could meet the need as well. Although Protestant had no burden to demonstrate its fitness, its witnesses and one of Applicant's witnesses (or the public witness favoring competition) testified that its service was good.

43. Applicant has raised the issue of competition (a factor only in Class D applications) which the Commission will address in the following section. However, based only on traditional analysis of public convenience and necessity, the Commission's inquiry would end here with a denial of the application absent the issue of tribal jurisdiction.

Competition: Existing carrier's ability to meet public need; resulting harm

44. The Commission weighs competition as a factor when raised as an issue in applications for Class D garbage hauling authority. Each case stands on its own facts and circumstances. The Commission does not view competition as a threshold, controlling element, but rather in the context of the basic principles of motor carrier regulation. Upon determining fitness of an applicant and public need for the service, the Commission examines the ability of existing carriers to meet the need and the harm to existing carriers if the application were granted. In this case Protestant has the authority, facilities, equipment and financial wherewithal to perform this service and meet the need. Protestant has demonstrated that it would be harmed if Applicant is granted the authority it seeks.

45. The Commission has interpreted Section 69-12-323(2)(b), MCA, as providing that for Class D applications the Commission may grant authority based on a showing that competition would promote the public interest in the motor carrier context, although an existing carrier could

meet the need or would be harmed by the grant of additional authority. Docket No. T-9590, Order No. 6326, & 90. Under the record of this case, Applicant has not shown that there is a need for competition that would promote the public interest. There is abundant competition that has already harmed Protestant, and perhaps Applicant as well. In fact, Applicant and Protestant have already engaged in competition, including the tribal contracts and the service to tribal members in Ronan and Pablo, Protestant's core service area. Applicant's testimony indicates that he does not intend to serve equally in the 25-mile radius, including tribal members south to Evaro, but instead wants to serve the non-tribal members of Protestant's core area north to the landfill. He has shown no interest or effort in serving the tribal members on the less-populated east shore, either. A grant of authority on the grounds that competition would promote the public interest is the exception and not the rule. There is no showing here that competition would result in better service and rates from existing carriers, including Protestant. On the basis of competition, the Commission finds that the application for a service area extended to a 25 mile radius from St. Ignatius should be denied.

Jurisdiction

46. The issue of tribal jurisdiction is fraught with difficulty on this reservation where the tribal and non-tribal economic interests are intertwined and where the Commission has regulated garbage-hauling. Applicant obtained a valuable property right when Plouffe Disposal acquired the certificate to haul garbage. The seven-mile radius was apparently Applicant's business choice in 1971; Plouffe stipulated to this radius and did not attempt to expand until 1992. Plouffe Disposal was recognized as the authorized carrier and for a long time had little, if any, competition in the seven-mile radius. Plouffe Disposal built a very successful business, providing excellent service. Mr. Plouffe applied for additional authority, which was denied in Docket No T-9903, Order No. 6166, issued December 21, 1992.

47. A certificate of operating authority from the Commission carries weight and has benefited Plouffe Disposal. Desiring to provide service beyond the seven-mile radius, Mr. Plouffe has taken some inconsistent, conflicting positions. Various, he has argued that the Commission has authority and must grant him the requested amended certificate and that the Commission has no

authority and he does not need the certificate. The Commission, however, must decide an application for authority based on the application itself, the record, and traditional analysis. Applicant did not demonstrate a need that was not being met or could not be met easily by Protestant; Protestant demonstrated harm to itself if the application is granted; and Applicant did not demonstrate that competition would promote the public interest. The Commission finds that the application to extend the radius to 25 miles from seven miles must be denied based on the record and traditional analysis.

48. The second prong of the application, "to provide services to any tribal member or business within the exterior boundaries of the Flathead Reservation," presents a quandary. Presumably, if the application were granted in its entirety, Applicant would proceed without questioning the Commission's right to grant a tribal member authority for any of its operations, tribal or non-tribal. If the application were denied in part or entirety, however, Applicant would challenge the Commission's authority over a tribal member whatsoever. Pursuant to ' 69-12-323(3), MCA, the Commission may grant all of, part of or none of "the certificate as prayed for," based on the evidence. Placing the request to serve tribal members in the application requires that the Commission determine whether to grant this part of the prayer. The quandary: if there is no jurisdiction, as alleged, then what the Commission grants or denies is a nullity, regardless of what the Commission decides.

49. The Commission has conferred an economic benefit on Plouffe Disposal and regulated its operations for nearly 24 years. In general, Mr. Plouffe and his father before him have been exemplary carriers. The Flathead Reservation is located in a developing area in which tribal and non-tribal business enterprises need and rely on each other far more than in other reservations within Montana. The record in this case certainly supports the mutual cooperation, support and interaction. When conflicts arise, they are settled or go to court in an orderly fashion, for the most part. The Commission is not a court; it is an administrative agency charged with regulating intrastate motor carriage, which now means passenger service, household goods and garbage-hauling. Plouffe Disposal has assented to and accepted the benefit of the Commission's regulation without challenge until recently.

50. The Commission makes decisions based on traditional analysis and practice. Past Commission actions (or omissions), as expressed in letters, indicate that the Commission policy and practice has been to withhold enforcement within the reservation for operations between tribal members. Withholding enforcement has not meant that the operations within the reservation boundaries were unregulated. Each case depended on what the tribal member requested from the Commission, and was based on the member's operations, persons affected by the exercise of authority (tribal and non-tribal), history of operations, and any tribal ordinances regulating motor carriage.

51. The Commission, based on Applicant's request, will permanently withhold enforcement of its regulatory authority over Applicant's service to tribal members within the reservation. The Supreme Court has observed that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 2584. Under the Bracker test, there is no preemption of intrastate motor carriage regulation of garbage hauling, nor tribal laws and self-government at stake here, regulating or choosing not to regulate motor carriage on the reservation. This decision is not a grant of the authority as requested, but a recognition that Applicant no longer desires regulation of its tribal activities.

52. The Amicus raised issues of tribal self-sufficiency and economic development, and questioned whether the Commission's holding a hearing on Flathead Disposal's protest was protectionism of a non-tribal certificate-holder. The Commission held the hearing as required by ' 69-12-321, MCA, when there is a protest of an application for authority, and would have done the same if Applicant had protested an application by Flathead Disposal.

53. The Commission applies its traditional analysis consistently. The goal is a strong motor carriage system in which garbage haulers can stay in business and continue to provide good service at reasonable rates. Applicant has benefited from regulation. Now, withholding enforcement over motor carrier service between tribal members may mean that Applicant will have to withstand

competition from other tribal members, to the detriment of his business and ultimately to the good service he has provided both tribal and non-tribal members.

54. The economic well-being of the Flathead Indian Reservation, Lake County, and environs depends upon continued mutual cooperation. The Commission, within its regulatory role, has done its part in the past to ensure a strong motor carriage system. The Commission recognizes that there may be some harm to Protestant by withholding enforcement between tribal members. Flathead Disposal should be strong enough and poised to handle the competitive pressure, which actually is the status quo since the Commission stayed enforcement over tribal service. However, the Commission is aware that Applicant and Protestant and all their witnesses really wanted everyone to prosper together. The future of the area depends on joint efforts. Regretfully, the Commission's role is limited to the exercise of its jurisdiction pursuant to Title 69, Chapter 12, Montana Code Annotated.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. § § 2-4-601 et seq., MCA.

3. An applicant for a certificate of Class D operating authority must show that the public convenience and necessity require the proposed service. A determination may include a consideration of competition. § 69-12-323, MCA.

4. Applicant has not demonstrated a public demand or need for the proposed service which is not met or cannot be met as well by existing carriers.

5. Granting this application would have an adverse effect on Protestant.

6. Applicant has not shown that competition requires a grant of this authority in promotion of the public interest.

7. The Commission concludes that it will withhold enforcement of regulatory statutes for transportation of garbage for tribal members by tribal members within the exterior boundaries of the reservation.

ORDER

NOW THEREFORE IT IS ORDERED that the application of Gary Plouffe, dba Plouffe Disposal, St. Ignatius, Montana for an amendment to the Applicant's Class D Certificate of Public Convenience and Necessity is denied. Applicant retains its authority, unamended, as follows:

Class D - garbage and refuse within St. Ignatius, Montana and between points and places within seven (7) miles thereof. Carrier is allowed to transport authorized commodities to certified landfills from territory authorized.

The Commission shall permanently withhold enforcement over motor carriage, garbage hauling service provided by Applicant to tribal members within the exterior boundaries of the Flathead Indian Reservation.

Done and Dated this 22nd day of February, 1995 by a vote of 2-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair

DAVE FISHER, Vice Chair

BOB ROWE, Commissioner
(Voting to dissent - Opinion Attached)

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

DOCKET NO. T-93.98.PCN, FINAL ORDER NO. 6269b

OPINION OF COMMISSIONER ROWE

The order attempts to recognize the legitimate interests of the Confederated Salish and Kootenai Tribes and the State of Montana in economic regulation of motor carriers hauling garbage. By regulating service by a tribal member carrier to non-tribal members but refraining from regulating service to tribal members, the order strikes the balance I had originally thought might be correct. Review of the parties' briefs, oral argument, and the cases cited persuades me that tribal government should be primarily responsible for regulating the activity of its members. As developed through questioning at oral argument, tribal and non-tribal customers and carriers alike would benefit from a coordinated approach to motor carrier regulation.

I first became aware Applicant was a tribal member and claimed an exemption from state regulation as a result of the letter from Tribal Chairman Pablo, dated August 18, 1993. In response, the Commission refrained from enforcement pending resolution of the issue. A determination of jurisdiction was made more complicated because Applicant had himself benefited from state regulation for several decades, and was in this case requesting an expansion of his PSC authority.¹ The best approach would have been for Applicant or his attorney to seek a declaratory ruling from the Commission concerning jurisdiction at the outset of the proceeding. This was not done.²

¹ See, Lambert v. Ryzik, 51 St.Rptr. 1250 (December 6, 1994), finding no threat to tribal sovereignty when Indian plaintiffs chose to invoke state district court jurisdiction rather than sue in tribal court.

² Protestant faced the greatest burden as a result. Not only did he have to present a case concerning the traditional elements of public convenience and necessity, he also faced the uncertainty about whether or not his competitor was subject to regulation.

Subject matter jurisdiction flows first from federal power under the Commerce Clause of the United States Constitution. Art. I, Section 8, Clause 3. This power is implemented through Public Law 280, which provided for the permissive extension of civil jurisdiction over American Indians residing on reservations to the states where those reservations are located. 25 U.S.C. Section 1321, *et seq.* In turn, Tribal Ordinance 40-A (Revised) grants the State concurrent jurisdiction over criminal law and eight areas of civil law. The area most likely on point is "Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways." However, motor carrier regulation is distinct from general regulation of motor vehicles operating on roadways.³

Amicus's discussion of Tribal responsibility under the federal Resource Conservation and Recovery Act (RCRA) is relevant, but reliance on RCRA is overstated. Economic regulation of motor carriers is distinct from environmental regulation of disposal. More relevant is Tribal activity to undertake transportation planning. Unfortunately, counsel was not able to fully inform the Commission of these efforts.

So too, Applicant wrongly characterizes the State's concern when he argues that "[t]he only conceivable state interest in this case is to protect the economic interests of a non-tribal member." Brief, p. 7. In fact, both the State and the Tribal governments have compelling interests within their

³ Burlington Northern Railroad v. Dept. of Public Service Regulation, 221 Mont. 497 (1986), is not on point in that it involved the PSC's obligation to protect railroad shippers from closure of facilities on reservation land by a non-Indian railroad. Further, in that case the tribal government had asserted no conflicting jurisdiction.

spheres in promoting a sound system of solid waste motor carriage. That system exists to provide safe, reliable, sanitary and affordable service to tribal and non-tribal customers.

That the system is basically sound is evinced by the Applicant and Protestant themselves. Both have built solid, professional operations, which provide high-quality service. Both operations stand in contrast to several "unregulated" operators in the area, about which complaints were voiced at the hearing.⁴

In sum, I would recognize the Confederated Tribes' assertion of subject matter jurisdiction over solid waste transportation by Tribal members operating within the boundaries of the Reservation. I would then work with the Tribal government to coordinate Commission and Tribal activities in order to ensure a system of sound carriage by non-tribal and tribal carriers for non-tribal and tribal customers.

RESPECTFULLY SUBMITTED this 22nd day of February, 1995.

BOB ROWE, Commissioner

⁴ I would place greater reliance than does the quorum majority on the "competition" element under Section 69-12-323(2)(b), MCA. Protestant has done a fine job using the security of regulation to improve his service, particularly including investment in expensive, modern equipment. In addition, within the regulatory framework, both Applicant and Protestant appear to have worked to meet customer demands, correct complaints, and generally increase quality, partially in response to competition from one another and from several other regulated carriers.